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KHAIRY JAMALUDDIN

v.

DATO' SERI ANWAR IBRAHIM

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COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02(IM)-3251-12-2011]

C

24 APRIL 2013

CIVIL PROCEDURE: *Striking out - Application for - Claim for defamation - Libel - Defence of justification - Whether issues raised solely on question of law - Whether question of law at first blush involved some*

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complexity - Whether issues raised required careful consideration of court of first instance - Whether court could grant summary judgment

TORT: *Defamation - Libel - Defence of justification - Whether words uttered true in their natural and/or ordinary meaning and/or innuendo meaning - Whether factual findings in criminal case involving respondent*

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applicable in present case - Whether judgment of a criminal court admissible as evidence in civil case - Evidence Act 1950, s. 43

The respondent's case, which was based on libel, was that the appellant had uttered words which were allegedly defamatory and

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libellous of the respondent. The appellant denied the allegation and also pleaded the defence of justification claiming that the impugned words were substantially true in their natural and/or ordinary meaning and/or innuendo meaning, based on the factual findings by the Federal Court in the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* (*'Dato' Seri Anwar Ibrahim'*). The appellant

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subsequently sought to strike out the respondent's claim under O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC'). However, the learned judge dismissed the appellant's application on the ground that pursuant to s. 43 of the

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Evidence Act 1950, a judgment of a criminal court was not admissible as evidence in a civil case.

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Held (dismissing appeal with costs; affirming decision of High Court)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) It was held in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* ('*Bank Negara Malaysia*') that where the issue raised was solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14 of the RHC. Hence, the court was not prevented from granting a summary judgment merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand". (para 13)

(2) The principles of law pronounced in *Bank Negara Malaysia* is not limited in its application to O. 14 proceedings but extends to applications under O. 18 r. 19 of the RHC as both applications are summary in nature. (para 14)

(3) The issues of law stated here were not just issues which at the first blush appeared complex but were genuinely complex and required careful consideration by the High Court. The admissibility of the remarks in *Dato' Seri Anwar Ibrahim* and more particularly whether the remarks once admitted are conclusive of the defence of justification required careful consideration by the court of first instance. The legal issues raised by the appellant were not consistent with his submission that the respondent's claim was wholly unsustainable even at this stage, a necessary prerequisite to the claim being struck off under O. 18 r. 19 of the RHC. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Kes responden, yang berasaskan kepada libel, adalah bahawa perayu telah menyebut perkataan-perkataan yang didakwa memfitnah dan bersifat libel terhadap responden. Perayu menafikan dakwaan tersebut dan memplidkan pembelaan justifikasi dengan menyatakan bahawa perkataan-perkataan yang dipersoalkan adalah betul secara substansial dalam maksud semula jadi dan/atau biasa dan maksud innuendo, berdasarkan dapatan fakta oleh Mahkamah

Persekutuan dalam kes *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* ('*Dato' Seri Anwar Ibrahim*'). Perayu seterusnya memohon untuk membatalkan tuntutan responden di bawah A. 18 k. 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Walau bagaimanapun, yang arif hakim telah menolak permohonan perayu atas alasan bahawa berikutan s. 43 Akta Keterangan 1950, sesuatu penghakiman dari mahkamah jenayah tidak boleh diterima sebagai keterangan dalam kes sivil.

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan Mahkamah Tinggi)
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Adalah diputuskan dalam kes *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* ('*Bank Negara Malaysia*') bahawa jika isu yang dibangkitkan adalah persoalan undang-undang semata-mata tanpa rujukan kepada apa-apa fakta atau di mana fakta adalah jelas dan tidak dipertikaikan, mahkamah wajar melaksanakan kewajipannya di bawah A. 14 KMT. Dengan itu, mahkamah tidak dihalang daripada memberikan penghakiman terus hanya kerana "persoalan undang-undang secara sepintas lalu melibatkan kerumitan dan dengan itu mengambil masa yang lebih untuk difahami".

(2) Prinsip undang-undang yang dijelaskan dalam kes *Bank Negara Malaysia* tidak terhad dalam pemakaiannya kepada prosiding A. 14 tetapi dilanjutkan pemakaiannya di bawah A. 18 k. 19 KMT kerana kedua-dua permohonan tersebut adalah bersifat permohonan terus.

(3) Isu undang-undang yang dinyatakan di sini bukan hanya isu-isu yang secara sepintas lalu kelihatan rumit tetapi adalah sebenarnya rumit dan memerlukan pertimbangan teliti oleh Mahkamah Tinggi. Penerimaan masuk pernyataan oleh Mahkamah Persekutuan dalam kes *Dato' Seri Anwar Ibrahim* dan khususnya sama ada pernyataan tersebut, sebaik sahaja diterima menjadikan pembelaan justifikasi tersebut muktamad, memerlukan pertimbangan teliti oleh mahkamah perbicaraan. Isu undang-undang yang dibangkitkan oleh perayu tidak konsisten dengan hujahannya bahawa tuntutan responden tidak boleh dikekalkan walaupun pada peringkat ini, suatu prasyarat yang perlu untuk tuntutan dibatalkan di bawah A. 18 k. 19 KMT.

Case(s) referred to:

Bandar Builders Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***

DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(refd)***

European Asian Bank AG v. Punjab & Sind Bank [1983] 2 All ER 508 ***(refd)***

Hollington v. F Hewthorn & Co Ltd [1943] 2 All ER 35 ***(refd)***

Hunter v. Chief Constable of the West Midlands Police & Ors [1982] AC 529 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 43

Penal Code, ss. 377A, 377D

Rules of the High Court 1980, O. 14, O. 18 r. 19(1)(a), (b), (d)

Syariah Criminal Offences (Federal Territories) Act 1997, s. 25

Civil Evidence Act 1968 [UK], ss. 11, 13(1), (2)

Other source(s) referred to:

Gatley on Libel and Slander, 11th edn, para 11.4

For the appellant - Muhamad Shafee Abdullah (Badrul Munir Mohd Bukhari with him); M/s Shafee & Co

For the respondent - Sulaiman Abdullah (Leela Jesuthasan with him); M/s Faiz & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-23-44-2008]

Reported by S Barathi

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] The respondent filed a claim based on libel. The respondent's pleaded case was that the appellant had uttered the following words:

> DAP main PAS dari kanan. PAS main DAP dari kiri. Anwar main dua-dua dari belakang

at a ceramah at Lembah Pantai in Kuala Lumpur on or about 20 February 2008.

[2] The respondent alleged that the impugned words were defamatory and libellous of the respondent and in their natural and ordinary meaning, meant and were understood to, *inter alia* mean that:

(i) The respondent had engaged in carnal intercourse with a male partner or partners against the order of nature which is an offence under s. 377A and 377D of the Penal Code punishable with imprisonment and whipping;

(ii) The respondent was a homosexual;

(iii) That the respondent was engaged in activities contrary to Islam and was further guilty of an offence of liwat under s. 25 of the Syariah Criminal Offence (Federal Territories) Act 1997 which is punishable by imprisonment and whipping;

(iv) That the respondent was a pervert and/or of no morals;

(v) That the respondent was unfit to hold political, or any office;

(vi) The plaintiff was a person of criminal tendencies; and

(vii) That the respondent was dangerous to Malaysian society.

[3] Apart from denying that the impugned words bore or were understood to bear or were capable of bearing the meaning ascribed to the same in para. 2 above, the appellant also sought to justify a lesser defamatory meaning. The respondent also pleaded the defence of justification claiming that the impugned words are substantially true in their natural and/or ordinary meaning and/or innuendo meaning. The defence of justification was solely based on the factual findings by the Federal Court in the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737. The following passage:

> to summarise our judgment, even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivolli Villa did happen sometime ...

in the judgment of the Federal Court in this case relied upon in support of this defence.

[4] The appellant's pleaded case was that: A

> The above quotation clearly means that the Federal Court found the plaintiff to be involved in homosexual activities. Earlier, the High Court at Kuala Lumpur found the plaintiff guilty on a charge of sodomising one, Azizan b. Abu Bakar and the conviction was upheld by the Court of Appeal. In the appeal to the Federal Court, although the plaintiff's appeal was allowed by the majority of the Federal Court, nevertheless the majority had made a specific finding of fact as quoted above; B
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> Further, the dissenting judgment of Rahmah Hussain, FCJ in the same case concluded that the plaintiff was guilty of the offence under s. 377B of the Penal Code, a buggery offence. C
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> Another man, Dr. Munawar Anees's conviction still stands, in taking part with the plaintiff in homosexual acts. The application by Dr. Munawar Anees to the Federal Court to review the decision of the Court of Appeal under Rule 137 of the Rules of the Federal Court 1995, was dismissed on 17 December 2008. D

[5] On 21 February 2011, the appellant filed a summons in chambers under O. 18 r. 19(1)(a), (b) and (d) contending that the plaintiff's/appellant's statement of claim did not disclose a reasonable cause of action and/or was frivolous, vexatious and filed in abuse of the process of the court *inter alia* on the following grounds: E

(a) Bahawa keputusan Mahkamah Persekutuan dalam kes *Dato' Seri Anwar Ibrahim v. PP* [2004] 3 CLJ 737 jelas telah mendapati plaintif pernah terlibat dalam aktiviti-aktiviti homoseksual. Pada awalnya Mahkamah Tinggi di Kuala Lumpur mendapati plaintif bersalah di atas tuduhan meliwat Azizan bin Abu Bakar dan sabitan ini telah disahkan oleh Mahkamah Rayuan. Di dalam rayuan di Mahkamah Persekutuan, walaupun rayuan plaintif dibenarkan oleh majoriti Hakim-Hakim Mahkamah Persekutuan, namun begitu majoriti telah membuat keputusan fakta secara spesifik seperti petikan di perenggan 10 Afidavit Sokongan Khairy Jamaludin Abu Bakar yang diikrarkan pada 18 February 2011. Oleh yang demikian, defendan adalah berjaya menunjukkan pembelaan justifikasi; F G H

(b) Bahawa defendan pada masa tersebut adalah Naib Ketua Pergerakan Pemuda UMNO Malaysia yang mempunyai tanggungjawab undang-undang, moral dan sosial kepada orang awam dan masyarakat Melayu. Orang awam secara amnya mempunyai suatu kepentingan sah yang bersamaan I

dalam menerima maklumat tentang hal-hal dalam perbincangan-perbincangan yang memberi kesan kepada kebajikan sosial, ekonomi dan politik. Oleh yang demikian, defendan adalah dilindungi oleh pembelaan perlindungan bersyarat;

(c) Bahawa terdapat keputusan kehakiman di dalam prosiding-prosiding sebelumnya di antara plaintif dan Tun Dr Mahathir Mohamed pada tahun 1999 di mana tindakan plaintif telah dibatalkan oleh R.K. Nathan J atas alasan bahawa tindakan plaintif jelas tidak dapat dipertahankan setelah mempertimbangkan sabitan-sabitan Sukma Darmawan Sasmitaat Madja dan Dr. Munawar Anees dan pembelaan "justifikasi' dan 'Perlindungan Bersyarat'". Prosiding-prosiding tahun 1999 ini dilaporkan sebagai *Dato' Seri Anwar v. Dato' Seri Dr Mahathir Mohamed* [1997] 7 CLJ 32. Rayuan plaintif kepada Mahkamah Rayuan telah ditolak. Ini dilaporkan sebagai *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamed* [2001] 1 CLJ 519. Kemudiannya kebenaran untuk merayu di Mahkamah Persekutuan juga telah ditolak. Penghakiman oleh Mahkamah Persekutuan dilaporkan di [2001] 1 CLJ 663. Oleh yang demikian, plaintif adalah diestopkan daripada mengambil tindakan yang sama terhadap defendan di dalam kes ini.

[6] The application came up for hearing on 21 December 2011. Her Ladyship identified the main issue in the case to be:

2.1. The main issue here is whether a judgment of a criminal court is admissible in a civil court.

Her Ladyship then proceeded to examine s. 43 of the Evidence Act 1950 on the premise that the answer to the above issue revolved around the interpretation of this section. Her Ladyship's opinion of this section based on the authorities was that:

2.2. Section 43 of the Evidence Act 1950 and the decided cases of this country have made it clear that a judgment of a criminal court is not admissible as evidence in a civil case. Our position here is akin to the Indian provision where our s. 43 is in *pari materia* with s. 43 of the Indian Evidence Act. Learned defence counsel has vigorously attacked the judgment of the U.K. Court of Appeal case of *Hollington v. F. Hewthorn & Co. Ltd.* [1943] 2 All ER. (The facts of this case have been set out in the defendant's written submission). As far as the U.K.'s present position is concerned, the U.K has seen it fit to amend their law after

> *Hollington*'s case was criticized in a number of decisions thereafter (see *Goody v. Odhams Press Ltd* [1966] 3 AER 369; *Barclays Bank Ltd. v. Cole* [1966] 3 All ER 948; *Hunter v. Chief Constable of West Midlands & Anor* [1981] 3 All ER 729). Similarly, Singapore has also expressly amended its law *vide* s. 42A of their Evidence Act to allow a conviction to be admissible. Malaysia has till today, no such amendment and s. 43 as it now stands is clear that a judgment of a criminal court is not admissible as evidence in a civil case.

Based on the reasoning set out above, Her Ladyship dismissed the appellant's application to strike out the respondent's claim. In other words, Her Ladyship was satisfied that the *obiter* remarks in the judgment of the Federal Court in the case of *Dato' Seri Anwar Ibrahim v. PP (supra)* were not admissible as evidence in the case before Her Ladyship. Following this ruling, Her Ladyship dismissed the appellant's application since the effect of Her Ladyship's judgment was that the appellant would now have to lead evidence to establish his defence of justification.

[7] Before us, learned counsel for the appellant contended that the learned judge's interpretation of s. 43 of the Evidence Act 1950 was primarily based on the reasoning of the English Court of Appeal in the case of *Hollington v. F Hewthorn & Co Ltd* [1943] 2 All ER 35. Learned counsel for the appellant apart from criticising the reasoning behind the decision of the English Court of Appeal in *Hollington v. F Hewthorn & Co Ltd (supra)*, highlighted the fact that the decision of the court in *Hollington v. F Hewthorn & Co Ltd (supra)* no longer represented the law in England. The English Parliament having introduced ss. 11 and 13 of the Civil Evidence Act 1968. Section 13(1) and (2) being particularly relevant since it deals with claims for libel and slander. This section provides as follows:

> (1) In an action for libel or slander in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that, at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that he committed that offence; and his conviction thereof shall be admissible in evidence accordingly.
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> (2) In any such action as aforesaid in which by virtue of this section a person is proved to have been convicted of an offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the

A information, complaint, indictment or charge-sheet on which that person was convicted, shall, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, be admissible in evidence for the purpose of identifying those facts.

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[8] Learned counsel for the appellant then drew our attention to the decision of the House of Lords in the case of *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 529, a decision based on s. 13 of the Civil Evidence Act 1968. The C *ratio* of the decision of the House in this case is that when a case has been decided conclusively in a criminal court, especially at the highest level, the issues decided therein must not be allowed to be re-litigated in a civil proceeding as it would tantamount to initiating a collateral attack on a final decision against the intending D plaintiff (per Lord Diplock). One of the reasons advanced by the House of Lords for this decision is the higher burden of proof in criminal cases as compared to the civil burden.

[9] Learned counsel for the respondent, on the other hand, E submitted that:

(i) What is binding is the *ratio decidendi* of a case and the principle of law that it establishes, not a remark that had no bearing on the outcome of the case. Section 43 of the F Evidence Act 1950 renders the existence of a judgment as relevant, but not the contents. A judgment is conclusive only in respect of the legal state of affairs effected and not of the facts upon which it is based;

(ii) The appellant was seeking to strike out the respondent's claim G by relying merely on an *obiter* remark made in the judgment of the Federal Court, as justification. To succeed in the defence of justification, the burden is on the appellant to adduce admissible evidence to prove the truth of the impugned words. Learned counsel for the respondent submitted that a remark H made in passing by the Federal Court unrelated to the facts of this case, is not sufficient to amount to justification so as to preclude the appellant from the need to produce evidence to support his defence. Merely repeating something cannot amount to justification. A passage in the text book by *Gatley* I 11th edn., para. 11.4 - Tab 7 of the IA(R) 1 was relied upon for the proposition that the burden was on the appellant to prove that the impugned words are true; and

(iii) It was further submitted on behalf of the respondent that the appellant cannot rely on the *obiter* remark in the Federal Court judgment, as proof of justification, for, *inter alia*, the following reasons:

(a) A judgment of a criminal court is not admissible as evidence in a civil case;

(b) The remark was *obiter* and not binding; and

(c) It is not a fact in issue.

[10] For the first submission, reliance was placed on s. 43 of the Evidence Act 1950. The following passage in the text book *Sarkar's Law of Evidence*:

> The object behind s. 43 appears to be twofold: (1) to treat every case a class by itself so that the judgment delivered in one case may not be availed of by parties to another case; and (2) to maintain the independence of courts by preventing parties from submitting before the court hearing their case the judgments of other courts. The author also stated (at p. 932), "The judgment merely establishes the fact that there has been a judgment but it does not prove its correctness".

was cited in support of this proposition.

[11] As regards, the second and third submission, the following passage:

> The judgment was not a fact is issue in the instant case. The production of the previous judgment merely establishes the existence of a prior judgment and there is no presumption that a prior judgment is the correct decision on the matter. There is nothing in the Evidence Act to warrant the conclusion that the statements or findings if fact in another case can be used as evidence in a subsequent case to decide the points which are in issue in the subsequent case.

in the judgment of Gopal Sri Ram JCA (as he then was) in the decision of this court in *DP Vijandran v. Karpal Singh & Ors* [2000] 6 CLJ 433; [2000] 3 MLJ 22 was cited in support of this proposition.

Decision Of The Court

[12] It is settled law following the decision of the Supreme Court in *Bandar Builders Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 that:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.
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> Both the counter claim and the defence of the counter claim have raised some issues which required serious consideration. This was not a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. So long as the pleadings disclosed some cause of action or raised some question fit to be decided by the judge, the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out. It cannot be said that they were frivolous, vexatious or may embarrass or delay the fair trial of the action or that the pleadings were otherwise and abuse of the process of the court.

[13] The Court of Appeal in England in the case of *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 opined that, in an appropriate case, a court of law should decide a point of law in O. 14 proceedings even: 'if the question of law is at first blush of some complexity and therefore takes a little longer to understand'. Our Supreme Court in the case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400 accepted this proposition of law as good law through the judgment of Mohamed Azmi FCJ (as he then was) when His Lordship said:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand (see *Cow v. Casey* and *European Asian Bank AG v. Punjab & Sind Bank* at p 516).

[14] In our judgment, the aforesaid principle of law pronounced by our Supreme Court in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors (supra)* is not limited in its application to O. 14 proceedings but extends to applications under O. 18 r. 19. We opine to this effect because both applications are summary in nature. The submission of counsel for the appellant is that we should rule in favour of admitting the *obiter* remarks of the Federal Court in the judgment of the court in the case of *Dato' Seri Anwar Ibrahim v. PP (supra)* pursuant to s. 43 of the Evidence Act 1950. In support of this submission, counsel relies on the criticism of the judgment of the English Court of Appeal in the case of *Hollington v. F Hewthorn & Co Ltd (supra)* and the changes in the law that have taken place in England and Singapore. In other words, according to the submission of counsel, it is unarguable that these *obiter* remarks once admitted are conclusive of the defence of justification to the respondent's claim based on slander and libel.

[15] In our judgment, the answer to this issue requires an in-depth study of the authorities dealing with s. 43 of the Evidence Act 1950, a careful examination of the judgment of the Federal Court in the case of *Dato' Seri Anwar Ibrahim v. PP (supra)* and a determination as to whether the English and Singapore cases applying the amended provisions in their respective jurisdictions can be extended to apply to the facts of this case. With respect, the issues of law stated herein are not just issues which at first blush appear complex but are genuinely complex and require careful consideration by the High Court particularly since we have not introduced the changes to our law in the form of s. 13 of the Civil Evidence Act 1968. Accordingly, unlike the learned trial judge who dismissed the application on the ground that the *obiter* remarks are not admissible, we prefer to dismiss this appeal because we genuinely believe that the admissibility of the remarks of the Federal Court in the case of *Dato' Seri Anwar Ibrahim v. PP (supra)* and more particularly whether these remarks once admitted are conclusive of the defence of justification requires careful consideration by the court of first instance. In other words, in our judgment, the legal issues raised by counsel for the appellant are not consistent with his submission that the respondent's claim is wholly unsustainable even at this stage, a necessary prerequisite to the claim being struck off under O. 18 r. 19.

A Accordingly, we dismissed this appeal with costs on the conclusion of the appeal, affirmed the decision of the High Court and ordered the appellant to pay costs of RM10,000 to the respondent. We ordered the deposit to be paid to the respondent towards account of costs.

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